

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 KEVIN RANGER,) Case No. EDCV 08-1518-VAP
12 individually and on) (JCx)
13 behalf of a class of)
similarly situated)
individuals,)
14 Plaintiff,) [Motion filed on December 8,
15 v.) 2008]
16 T-MOBILE USA, INC., a)
Delaware corporation,)
17 Defendants.)
18)

19 The Court has received and considered the papers
20 filed in support of, and in opposition to, Defendant T-
21 Mobile USA, Inc.'s "Motion to Dismiss Under FRCP 9(b)." The matter is appropriate for resolution without hearing
22 pursuant to Local Rule 7-15; the hearing set on February
23 23, 2009 at 10:00 a.m. is vacated. For the following
24 reasons, the Court DENIES the Motion.

I. BACKGROUND

A. Factual Allegations

3 Plaintiff Kevin Ranger ("Plaintiff") registered for
4 cellular telephone service with Defendant T-Mobile USA,
5 Inc. ("Defendant") in 2004. (See Compl. at ¶¶ 23-24.)
6 In 2008, Plaintiff alleges Defendant placed charges on
7 his monthly billing statement for unwanted and
8 unauthorized mobile content services. (Id. at ¶¶ 26-27.)
9 Plaintiff alleges Defendant has a practice of "cramming,"
10 placing unauthorized charges on telephone bills, in its
11 billing system. (Id. at ¶¶ 16, 28-29.) According to
12 Plaintiff, Defendant knows and has known of this billing
13 problem and has failed to provide Plaintiff a refund or
14 change its billing practices to ensure accuracy. (Id. at
15 ¶¶ 22, 30.)

B. Procedural History

18 Plaintiff, on behalf of himself and a class of
19 similarly situated individuals, filed a Complaint against
20 Defendant in the California Superior Court, Riverside
21 County. The Complaint contained the following claims:
22 (1) Breach of Contract; (2) Violation of Consumer Legal
23 Remedies Act; (3) Violation of Unfair Competition Law;
24 and (4) Violation of California Public Utilities Code §
25 2890.

1 Defendant removed the case to this Court on October
2 29, 2008 on the basis of the Class Action Fairness Act,
3 28 U.S.C. § 1453. (See Not. of Removal at 2.)

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5 On December 8, 2008, Defendant filed a "Motion to
6 Dismiss Under FRCP 9(b)" ("Motion") and the Declaration
7 of James C. Grant ("Grant Declaration"). On January 12,
8 2009, Plaintiff filed Opposition and the Declaration of
9 Jay Edelson ("Edelson Declaration"). On January 16,
10 2009, Defendant filed a Reply.

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II. LEGAL STANDARD

13 Allegations of fraud must meet the heightened
14 pleading requirements of Federal Rule of Civil Procedure
15 9(b) ("Rule 9(b)"). See Fed. R. Civ. P. 9(b). Rule 9(b)
16 applies when a complaint specifically alleges fraud as an
17 essential element of a claim. Vess v. Ciba-Geigy Corp.
18 USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). It also
19 applies when the claim "sounds in fraud," by alleging the
20 defendant engaged in fraudulent conduct, but the claim
21 itself does not contain fraud as an essential element.
22 Id. at 1106. Indeed, even if a complaint does not assert
23 explicitly a claim for fraud and even if none of the
24 claims in a complaint "sound in fraud," any allegations
25 of fraudulent conduct in a complaint must be pled with
26 particularity. Id. at 1102-05.

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1 To satisfy the requirements of Rule 9(b), "[a]
2 plaintiff must set forth *more* than the neutral facts
3 necessary to identify the transaction. The plaintiff
4 must set forth what is false or misleading about a
5 statement, and why it is false." Id. at 1106 (quotation
6 omitted). Such allegations "must be accompanied by the
7 who, what, when, where, and how of the misconduct
8 charged." Id. (citation omitted, internal quotation
9 omitted). Specifically, the allegation must include "an
10 account of the time, place, and specific content of the
11 false representations as well as the identities of the
12 parties to the misrepresentations." Swartz v. KPMG LLP,
13 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v.
14 Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).
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16 Rule 9(b)'s particularity requirement must be read in
17 harmony with Rule 8 of the Federal Rules of Civil
18 Procedure, requiring a "short and plain" statement of the
19 claim. See Spiegler v. Home Depot U.S.A., Inc., 552 F.
20 Supp. 2d 1036, 1044 (C.D. Cal. 2008). Thus, the
21 particularity requirement is satisfied if the complaint
22 "identifies the circumstances constituting fraud so that
23 a defendant can prepare an adequate answer from the
24 allegations." Moore v. Kayport Packaging Exp., Inc., 885
25 F.2d 531, 540 (9th Cir. 1989).

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III. DISCUSSION¹

A. Application of Rule 9(b)

3 As an initial matter, Plaintiff has not attempted to
4 plead fraud nor do any of his claims, based on four
5 separate statutes, require him to plead fraud as an
6 element. Nevertheless, Defendant argues Rule 9(b)
7 applies because all of Plaintiff's four claims "sound in
8 fraud," based on the Complaint's separate section
9 describing Defendant's allegedly fraudulent scheme that
10 relates to all of Plaintiff's claims. (See Mot. at 6-7.)
11 Plaintiff argues only claim two, for violation of the
12 Consumer Legal Remedies Act ("CLRA"), and a portion of
13 claim three, for violation of the Unfair Competition Law
14 ("UCL"), sound in fraud. (See Opp'n at 5-6.)

16 Plaintiff accurately characterizes the nature of the
17 allegations in his Complaint. Although the Complaint has
18 a section describing Defendant's purportedly fraudulent
19 scheme, it is merely background information, and does not
20 relate specifically to each of Plaintiff's claims.
21 Plaintiff's second and third claims allege Defendant made
22 misrepresentations and engaged in fraud in violating the
23 CLRA and the UCL. Claims one and four, on the other

25 ¹ The parties argue about several matters not evident
26 on the face of the Complaint, including the purported
27 filing of several identical lawsuits by counsel related
28 to Plaintiff's counsel in this case. The Court limits
its review to the four corners of the Complaint. See Hal
Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
1542, 1555 n.19 (9th Cir. 1990).

1 hand, do not allege fraud, but breach of the service
2 agreement with Plaintiff and entry of unauthorized
3 telephone charges on customer billing statements. As
4 only Plaintiff's second and third claims "sound in
5 fraud," only they are subject to the heightened pleading
6 requirement of Rule 9(b). See Vess, 317 F.3d at 1104.

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8 **B. Rule 9(b)'s Heightened Pleading Standard**

9 Defendant argues Plaintiff's claims should be
10 dismissed under Rule 9(b). (See Mot.) According to
11 Defendant, Plaintiff fails to meet Rule 9(b)'s
12 requirements because the allegations of the putative
13 class are too general and the allegations of the putative
14 class representative do not identify the specific
15 disputed billing entries or the provider of the
16 unauthorized mobile content. (See Reply at 4.) In fact,
17 Defendant argues Plaintiff's allegations are so deficient
18 that it questions Plaintiff's standing to bring the
19 claims altogether. (Id. at 5.)

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21 In response, Plaintiff argues he alleges the "where,
22 when, who, and what" of Defendant's fraudulent billing
23 scheme, as it relates both to himself and the putative
24 class. (See Opp'n at 7 ("the misrepresentations occur on
25 T-Mobile's bills to its customers (where), at the time
26 the bills (when) are transmitted to customers [including
27 Plaintiff] (who). The nature of the misrepresentation is
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1 that the bills indicate the customers consented to and
2 approved the charges when in fact, the customers did not
3 consent to them (what)." .) According to Plaintiff, he
4 need not identify "at the pleading stages, a single
5 transaction, let alone each and every bill [Defendant]
6 has sent that contains a misrepresentation." (Opp'n at
7 .)

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9 Plaintiff is correct. His allegations of Defendant's
10 fraudulent billing practices satisfy the requirements of
11 Rule 9(b). See Vess, 317 F.3d at 1103-04; Cooper v.
12 Pickett, 122 F.3d 1186, 1196 (9th Cir. 1997), *amended on*
13 *other grounds by* 137 F.3d 616 (9th Cir. 1997) (finding
14 the complaint met the requirements of Rule 9(b) because
15 the allegations explained how certain of defendants'
16 public statements were false, instead of flatly stating
17 they were false, without supporting factual allegations).
18 The cases cited by Defendant are distinguishable on their
19 facts.

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21 Defendant relies on recent rulings within this and
22 neighboring Districts that found Rule 9(b) had not been
23 satisfied; each of these cases are distinguishable
24 factually.

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1 First, Defendant relies on Baytree Capital Assoc., LLC
2 v. Quan, 2008 WL 4447647, at *12 (C.D. Cal. 2008), where
3 the Honorable Christina A. Snyder found the plaintiff
4 failed to allege its fraud claims with sufficient
5 particularity. There, the plaintiff alleged securities
6 fraud under the Private Securities Litigation Reform Act
7 ("PSLRA"); the standard for fraud allegations under PSLRA
8 is different from the Rule 9(b) standard. See In re
9 Vantive Corp. Sec. Litiq., 283 F.3d 1079, 1091 (9th Cir.
10 2002) (recognizing Rule 9(b) standard applied in In re
11 GlenFed, Inc. Sec. Litiq., 42 F.3d 1541, 1551 (9th Cir.
12 1994), superceded by PSLRA). Accordingly, Baytree
13 Capital does not apply here.

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15 Next, Defendant cites Kearns v. Ford Motor Co., 2007
16 WL 5110308, at *2 (C.D. Cal. 2007), where the Honorable
17 Andrew J. Guilford dismissed an amended complaint for
18 failure to satisfy Rule 9(b). There, the plaintiff pled
19 he bought a car in reliance on the defendant's
20 "representations that [the particular car was] safer,
21 more reliable, and more roadworthy." Id. at 1. The
22 plaintiff alleged these representations were made by the
23 defendant through, inter alia, its national marketing
24 campaign, but failed to identify which commercials he
25 relied on, what representations were made in them, and
26 when he watched them. Id. at 2. In other words, in
27 Kearns, the plaintiff made only broad allegations about
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1 Ford Motor Company's advertisements, without explaining
2 which product the commercial was advertising, what
3 statements were made in the commercial, what was relevant
4 about the commercial, or when he watched them. Given
5 Ford's size and the number of products it sells, these
6 allegations were not sufficient to put the defendant on
7 notice of Plaintiff's claim.

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9 By contrast, Plaintiff here alleges a specific
10 fraudulent billing practice of Defendant: its failure to
11 authenticate billing entries on its own customer's bills.
12 Plaintiff's allegations allege sufficient information to
13 provide notice to Defendant and for Defendant to
14 determine how to defend against these allegations. Vess,
15 317 F.3d at 1106.

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17 Defendant also cites Streamcast Networks, Inc. v.
18 IBIS LLC, 2006 WL 5720345, at *9 (C.D. Cal. 2006), where
19 the plaintiff sued for fraudulent inducement based on
20 alleged misrepresentations made during contract
21 negotiations. The Court found the plaintiff failed to
22 plead adequately under Rule 9(b) the content of the
23 defendant's purported misrepresentations. This case,
24 too, is distinguishable on its facts. Here, Plaintiff
25 pleads sufficiently the basis for his allegations: that
26 Defendant engages in a fraudulent billing scheme of its
27 customers through its failure to authenticate billing
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1 entries from mobile content service providers. See Vess,
2 317 F.3d at 1103-04.
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4 Next, Defendant cites Crayton v. Rochester Medical
5 Corp., 2008 WL 3367604, at *8 (E.D. Cal. 2008), where the
6 Honorable Oliver W. Wanger found the plaintiff failed to
7 allege what specific instructions for a purported
8 defective product were fraudulent, thus failing to meet
9 Rule 9(b). This case too is distinguishable. Here,
10 Plaintiff does allege specifically the fraudulent billing
11 practices of Defendant. Unlike in Crayton, Plaintiff
12 states the unauthorized billing entries from mobile
13 content providers are the specific items demonstrating
14 Defendant's fraud.

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16 Finally, the Court grants Defendant's request for
17 Judicial Notice of Ford v. VeriSign, Inc., No. 05-CV-
18 0819-JM (RBB) (S.D. Cal. Dec. 14, 2005), attached as
19 Exhibit D to the Grant Declaration. See Fed. R. Evid.
20 201. In Ford, the Honorable Jeffrey T. Miller found the
21 plaintiffs' allegations of fraudulent misrepresentations
22 did not meet Rule 9(b). There, the plaintiffs alleged a
23 mobile content service provider's Internet website and
24 television advertisements did not inform the public that
25 entering a cellular telephone number, under the guise of
receiving a free "ringtone," would instead sign up the
customer automatically for a subscription plan. The
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1 plaintiffs failed to allege how each putative
2 representative plaintiff was defrauded, whether by the
3 Internet website or by the television advertisements, or
4 the specific circumstances of the defendant's fraud. In
5 our case, however, Plaintiff alleges how he, as the
6 putative class representative, was defrauded - in 2008,
7 there was an unauthorized charge on his bill from
8 Defendant for mobile content as a result of a flaw in
9 Defendant's billing practices - and alleges the "who,
10 what, when, where, and how" relating to Defendant's
11 alleged fraudulent billing practice as they relate to the
12 putative class members. Vess, 317 F.3d at 1103-04.

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14 Plaintiff provides specific factual allegations about
15 Defendant's purported fraudulent billing practices;
16 Plaintiff does not simply allege Defendant has fraudulent
17 billing practices. See Cooper v. Pickett, 122 F.3d at
18 1196. Furthermore, Plaintiff alleges how the billing
19 scheme operates, how it is fraudulent, how it affects
20 Defendant's customers, and that Defendant is aware of the
21 it but has made no efforts to correct it or refund its
22 customers for payment of the unauthorized charges. See
23 Vess, 317 F.3d at 1103-04.

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25 Whether or not Plaintiff can prove Defendant's
26 billing practices are fraudulent is a question left for a
27 summary judgment motion or trial; it is not appropriate
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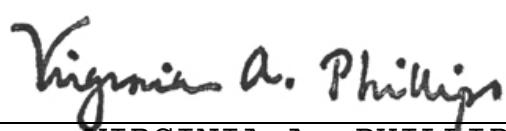
1 to "test the evidence at this stage." In re GlenFed,
2 Inc. Securities Litigation, 42 F.3d 1541, 1550 (9th Cir.
3 1994), *superceded in part by statute*, In re Vantive Corp.
4 Sec. Litig., 283 F.3d 1079, 1091 (9th Cir. 2002).

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6 **V. CONCLUSION**

7 For the foregoing reasons, the Court DENIES
8 Defendant's Motion.

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10 Dated: February 19, 2009


11 VIRGINIA A. PHILLIPS
12 United States District Judge

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